

# BOARD OF ZONING APPEALS

## MINUTES

6:30 PM

November 29, 2012

City Council Chambers

**MEMBERS PRESENT:** Leanne Cardoso, Bernie Bossio, Tom Shamberger

**MEMBERS ABSENT:** George Papandreas, Jim Shaffer

**STAFF:** Christopher Fletcher, AICP; Stacy Hollar

**I. CALL TO ORDER AND ROLL CALL:** Bossio called the meeting to order at 6:30 PM and read the standard explanation of the how the Board conducts business and rules for public comments.

**II. MATTERS OF BUSINESS:**

**A.** The minutes for September 19, 2012, were postponed due to lack of quorum present. Fletcher stated that the minutes for the October 17, 2012 hearing would be included on the Board's December agenda.

**III. OLD BUSINESS:** None

**IV. NEW BUSINESS:**

**A. CU12-13 / Rocktop, LLC / 341 Chestnut Street:** Request by Kevin Wilkey of Lush Hospitality Group, on behalf of Rocktop, LLC, for conditional use approval of a "Restaurant, Private Club" in the B-4 General Business District at 341 Chestnut Street; Tax Map 26A, Parcels 79 and 80.

Fletcher advised the Board that the petitioner notified Staff that he wished to withdraw this conditional use petition and that no action was required by the Board.

**B. CU12-18 / Tera, LLC / Protzman & Glenn:** Request by Project Management Services, on behalf of Tera, LLC for conditional use approval of a "Multi-Family Dwelling" use at Protzman Street and Glenn Street; Tax Map 20, Parcels 452, 453, 454, 457, and 458; R-2, Single- and Two-Family Residential.

Fletcher read the Staff Report stating that the petitioner seeks to raze three structures between 600 Protzman Street and 11 Glenn Street and construct two apartment buildings with required parking.

The petitioner's proposed development program details include:

- Two, 2.5-story apartment buildings each having four habitable levels, which observes the maximum height standard in the R-2 District (2.5 stories or 35 feet, whichever is less).
- A total of 40 one-bedroom units (40 beds).
- A total of 43 on-site parking spaces.
- An existing twelve-foot, unopened public right-of-way separates the two sites. The right-of-way must remain as it appears, based on tax maps, to be sole means of access, once developed, to at least one neighboring parcel.
- Building A, as shown on the proposed site plan, will be located at the corner of Protzman Street and Glenn Street and comprises the following:
  - The development site will be approximately 12,260 square feet created through the combination of Parcels 452 and 453.
  - The building and parcel frontage will be along Protzman Street.
  - The front setback will be 10 feet; the north or interior side setback will be 5 feet; the south or corner setback will be 7.5 feet; and, the rear setback will be approximately 76.5 feet. The proposed setbacks meet or exceed the minimum setback requirements in the R-2 District.
  - The proposed apartment building will include sixteen (16) one-bedroom units for a total of 16 bedrooms.
  - There are 18 proposed on-site parking spaces, three of which are designed as compact spaces, one as an accessible space, and one as a parallel space. The number of planned parking spaces exceeds the minimum parking requirement for the development based on the number of one-bedroom units (16 spaces).
- Building B, as shown on the proposed site plan, will be located along Glenn Street and comprises the following:
  - The development site will be approximately 17,737 square feet created through the combination of Parcels 454, 457 and 458.
  - The building and parcel frontage will be along Glenn Street.
  - The front setback will be 10 feet; the east side setback will be 5 feet; the west side setback will be approximately 16 feet; and, the rear setback will be approximately 60 feet. The proposed setbacks meet or exceed the minimum setback requirements in the R-2 District.
  - The proposed apartment building will include twenty-four (24) one-bedroom units for a total of 24 bedrooms.
  - There are 25 proposed on-site parking spaces, two of which are designed as accessible parking spaces and one as a parallel. The number of planned parking spaces exceeds the minimum parking requirement for the development based on the number of one-bedroom units (24 spaces).
- Access to the dwelling units will come directly from the respective parking areas with upper floors utilizing exterior but enclosed stair towers.

- The buildings will utilize a shared dumpster facility located toward the rear center portion of the entire development with access via the twelve-foot unopened public right-of-way.
- Residents will use a shared mailbox unit near one of the development's Glenn Street driveways. The petitioner will need to confirm in writing that the United States Postal Service will deliver mail to accessible units as needed.

The following Planning and Zoning Code related approvals are required for the development program as proposed.

Planning Commission (11/08/2012 hearing date):

- Case No. S12-07-III..... Development of Significant Impact Site Plan.  
APPROVED
- Case No. MNS12-15 ..... Minor subdivision to combine two existing parcels.  
APPROVED
- Case No. MNS12-16 ..... Minor subdivision to combine three existing parcels.  
APPROVED

Board of Zoning Appeals (11/29/2012 hearing date):

- Case No. CU12-18 ..... Conditional use approval for a "Multi-family Dwelling" use in the R-2 District.

Bossio recognized the petitioner's representative, Lisa Mardis, from Project Management Services located at 160 Fayette Street. Mardis explained that the two proposed structures are part of the overall development that is similar in nature to the first phase that was approved by the board previously. Mardis explained that all of the structures were designed to be built into the current environment and variances will not be needed. The development exceeds the off-street parking requirement and all applicable fire and building codes will be met. Mardis concurred with the staff report.

Bossio asked if a structure is going to be torn down on the proposed site. Mardis referred to the map attached to the staff report that displays the proposed plan which includes two residential sites and an accessory structure that will be demolished.

Bossio asked if the area contains multi-family structures and if any similar structures exist in the surrounding region.

Mardis stated that there are other properties that are zoned R-2 and are located behind the property, which include a mix of single-family rentals, duplexes, and a few multi-family structures.

Bossio mentioned that the proposed structure would enhance the appearance of the area by tearing down the older properties.

There being no further comments or questions by the Board, Bossio opened the public hearing asking if anyone was present to speak in favor of or in opposition to the request. There being none, Bossio declared the public hearing closed and asked for Staff recommendations.

Fletcher stated that it is the opinion of the Planning Division that the proposed redevelopment project represents a unique opportunity to modestly increase residential density within the R-2 District area that is within close proximity and walking distance to WVU's downtown campus. The proposed project is a part of a three multi-family structure development program, the first building of which was approved administratively and is located on the opposite corner of Protzman Street and Glenn Street.

The petitioner and project design professionals have worked closely with the Planning Division, Engineering Department, and Fire Department to incorporate significant development program improvements that enhance necessary parking spaces, driveways, solid waste management, fire department access, and landscape and buffering areas. Additionally, the proposed building exceeds required aesthetic requirements in the R-2 District by incorporating a combination of masonry materials, which should provide visually appealing qualities to this area.

The Board of Zoning Appeals must determine whether the proposed request meets the standard criteria for a conditional use by reaching a positive determination for *each* of the "Findings of Fact" submitted by the petitioner. Addendum B of this report provides Staff recommended revisions to the petitioner's findings of fact (deleted matter struck through; new matter underlined).

Staff recommends approval of Case No. CU12-18 following conditions:

1. That Minor Subdivision Petitions MNS12-15 and MNS12-16 be approved by the Planning Commission and related conditions performed.
2. That Development of Significant Impact Site Plan Petition S12-07-III be approved by the Planning Commission and related conditions performed.
3. That the development must meet all applicable federal Fair Housing and Americans with Disabilities Act standards as determined by the City's Chief Building Code Official.
4. That the petitioner shall incorporate, to the satisfaction of the Planning Division, all reasonable Technical Review Team recommendations in plans submitted with related building permit applications, which include at least the following:
  - a. That, prior to the commencement of any excavation and construction activities, construction fencing shall be erected and maintained along the entire length of the parcel boundary shared between the subject development site and Parcel 451 of Tax Map 20 (612 Protzman Street) for the purpose of protecting said parcel from construction-related encroachment.
  - b. That, to the satisfaction of the Planning Division and prior to the issuance of any certificate of occupancy, a permanent six-foot privacy fence shall be constructed, preferably vinyl or similar low maintenance material, and maintained along the entire length of the parcel boundary shared between the subject development site and Parcel 451 of Tax Map 20 for the purpose of screening and buffering the adjoining 612 Protzman Street single-family dwelling use from the subject multi-family dwelling use.
  - c. That the driveway entrance closest to the Protzman Street and Glenn Street intersection must be eliminated to promote best access management practices. Accordingly, cross access easements and related covenants must be included in the

deeds of the respective tracts. Said covenants should also address access to and use of shared facilities including, but not limited to, solid waste storage, mail delivery, common area, etc.

- d. That parking spaces 13A through 18A shown on the proposed site plan be shifted four to six feet away from Glenn Street for the purpose of providing a sufficient landscape bed to achieve desired parking lot screening requirements; provided, fire department access and maneuvering is not compromised.
  - e. That wheel stops shall be provided for each parking stall to protect pedestrian ways and landscaping.
  - f. That the shared dumpster shall be enclosed with masonry materials at least six (6) feet in height and include an opaque gate, standard concrete access apron, and concrete bollards at the rear of the enclosure to protect same from damage.
  - g. That, to the satisfaction of the Planning Division, internal concrete sidewalks with a minimum width of four feet shall be constructed for each building to provide pedestrian ways from the dwelling units and parking areas to the five-foot sidewalks that must be constructed along Glenn Street.
  - h. That, to the satisfaction of the Planning Division, the landscape beds flanking the driveway entrance must include appropriate deciduous trees as provided in Article 1367.11 of the Planning and Zoning Code and the landscape beds along Glenn Street appropriately screen parking areas.
  - i. That all exterior stairs, steps, landings, elevated walkways, railings, and support members may not be comprised of exposed wood or treated lumber.
  - j. That, to the satisfaction of the Planning Division, shutters framed by lintels, trim, and sills that simulate windows must be provided for the first and second stories of the side elevations visible from the public right-of-way.
- 5. That a Landscape Plan be submitted with the building permit application for review and approval by the Planning Division. Variance approval must be obtained should the Landscaping Plan not conform to the related performance standards set forth in the City Planning and Zoning Code.
  - 6. That a Lighting Plan be submitted with the building permit application for review and approval by the Planning Division. Variance approval must be obtained should the Lighting Plan not conform to the related performance standards set forth in the City Planning and Zoning Code.
  - 7. That Minor Subdivision Petitions MNS12-15 and MNS12-16 be approved by the Planning Commission and related conditions performed.
  - 8. That Development of Significant Impact Site Plan Petition S12-07-III be approved by the Planning Commission and related conditions performed.
  - 9. That the development must meet all applicable federal Fair Housing and Americans with Disabilities Act standards as determined by the City's Chief Building Code Official.

Shamberger made a motion to approve all the Findings of Facts as revised by Staff; seconded by Cardoso. Motion carried unanimously.

**NOTE:** The following Findings of Fact were included in the motion.

**Finding of Fact #1** – Congestion in the streets is not increased, in that:

The development exceeds the minimum off-street parking requirements for a multi-family use. Access to the proposed parking areas will utilize one driveway entrance advancing best access management practices. Continued efforts to increase residential density where properly zoned, within walking distance of primary residential destination points, and within a well-served transit corridor should serve to aid in relieving housing development demand in outlying areas of Monongalia County that appears to contribute to traffic congestion within the City of Morgantown.

**Finding of Fact #2** – Safety from fire, panic, and other danger is not jeopardized, in that:

The development will meet all related building and fire codes. The development plan appears to incorporate access and maneuvering planning for fire trucks and emergency vehicles within the alley and parking areas.

**Finding of Fact #3** – Provision of adequate light and air is not disturbed, in that:

The development will meet or exceed all setbacks and building height requirements for the R-2 District.

**Finding of Fact #4** – Overcrowding of land does not result, in that:

Off-street parking requirements will be exceeded for the proposed development. The development will also meet or exceed all setbacks and building height requirements for the R-2 District. Also, the occupancy will be similar to neighboring structures in the vicinity.

**Finding of Fact #5** – Undue congestion of population is not created, in that:

Requisite off-street parking will be developed and continued efforts to increase residential density where properly zoned; within walking distance of primary residential destination points; and; within a well-served transit corridor should serve to aid in relieving housing development demand in outlying areas of Monongalia County that appears to contribute to traffic congestion within the City of Morgantown.

**Finding of Fact #6** – Granting this request will not create inadequate provision of transportation, water, sewage, schools, parks, or other public requirements, in that:

The proposed development should not require any additional public infrastructure, utilities, or service beyond that which appears to be currently available within the immediate area.

Cardoso moved to approve conditional use petition CU12-18 as requested with Staff recommended conditions; seconded by Shamberger. Motion carried unanimously.

Bossio reminded Mardis that the Board's decision can be appealed to Circuit Court within thirty days and that any work related to the Board's decision during this period would be at the sole financial risk of the petitioner.

**C. CU12-17 / Mountaineer Gardening and Hydroponics / 258 Kingwood Street:**  
Request by Christopher Myers for conditional use approval of a "Florist Shop" use at 258 Kingwood Street; Tax Map 29, Parcel 447; R-1A, Single-Family Residential.

Fletcher read the Staff Report stating that the petitioner seeks to establish a retail use called "Mountaineer Gardening and Hydroponics" at 258 Kingwood Street. The first floor of the subject property was occupied from 1950 until 2001 by *Crestholm Pharmacy*. Prior to the pharmacy,

the subject space, which is approximately 592 square feet, was occupied by a general store. Staff understands that the subject first floor, non-residential space has remained vacant since the closure of the neighborhood pharmacy. The second floor of the subject property contains two dwelling units. Addendum A of this report illustrates the location of the subject site.

The nature of the petitioner's business is the retail sale of organic and hydroponics gardening products. Hydroponics is a method of growing plants using mineral nutrient solutions without soil either in a water or solution culture or in an inert medium culture such as perlite, sand, gravel, mineral wool, rockwool, coconut husk, etc. Plants and vegetables can be grown indoors year round.

Article 1329.02 "Definition of Terms" defines "Retail Sales Establishment" as:

"A business having as its primary function the supply of merchandise or wares to the end consumer. Such sales constitute the 'primary function' of the business when such sales equal at least eight (80) percent of the gross sales of the business."

"Retail Sales Establishment" uses are not permitted in any of the residential districts (R-1, R-1A, R-2, and R-3) or the PRO District. However, a closer examination of Table 1331.05.01 "Permitted Land Uses" reveals a number of non-residential or business uses permitted within these districts.

The following list includes business uses permitted either by-right or by conditional use approval in the R-1A District:

- Animal Grooming Service (conditional)
- Appliance Repair Establishment (conditional)
- Art Gallery (conditional)
- Retail Bakery (conditional)
- Barber Shop / Beauty Salon (conditional)
- Neighborhood Convenience Store (conditional)
- Class 1 Day Care Facility (by-right)
- Class 2 Day Care Facility (conditional)
- Drug Store (conditional)
- **Florist Shop** (conditional)
- Instruction Studio (conditional)
- Newsstand (conditional)

It appears that, unless a specific business or retail use is identified in Table 1331.05.01 "Permitted Land Uses", all retail-type business uses fall in the category of "Retail Sales Establishments" regardless of the establishment's scale, scope, or intensity.

It is the opinion of the Planning Division that the scale and intensity of the petitioner's proposed retail business reflects the neighborhood-scaled business uses identified above as permitted within the R-1A District either by-right or by conditional use approval. Further, the subject site has historically been occupied by business uses (drug store and neighborhood convenience store) that are currently permitted in the R-1A District with conditional use approval.

Article 1375.05 “Administrative Interpretations” provides the following guidance in addressing specific proposed uses that may not clearly fall within the common meaning of any of the uses listed in Table 1331.05.01 “Permitted Land Uses”:

- (A) Authority. The Planning Director, subject to the procedures, standards, and limitations of this article, may render written interpretations, including use interpretations, of the provisions of this Zoning Ordinance and of any rule or regulation issued pursuant to it. The Planning Director may forward requests for interpretations to the Board of Zoning Appeals, where, in the opinion of the Planning Director, the proposed use is not sufficiently similar to a use expressly listed as a permitted or conditional use on the Permitted Land Use Table 1331.05.01 to allow staff interpretation.
- (B) Purpose. The interpretation authority established by this section is intended to recognize that the provisions of this Zoning Ordinance, though detailed and extensive, cannot, as a practical matter, address every specific situation to which they may have to be applied. In particular, certain categories of uses are listed as either Conditional or Permitted uses, but certain specific proposed uses may not clearly fall within the common meaning of any of the listed uses. Many such situations can be readily addressed by an interpretation of the specific provisions of this Zoning Ordinance in light of the general and specific purposes for which those provisions have been enacted. Because the interpretation authority established is an administrative rather than a legislative authority, an interpretation shall not have the effect of adding to or changing the essential content of this Zoning Ordinance, but is intended only to allow authoritative application of that content to specific cases.
- (E) Standards for Use Interpretations. The following standards shall govern the Planning Director and the Board of Zoning Appeals (on appeals from the Planning Director) in issuing use interpretations:
  - (1) Any listed use defined in Article 1329, Definitions, shall be interpreted as therein defined;
  - (2) No use interpretation shall authorize any use in any district unless evidence is presented demonstrating that it will comply with the general district regulations established for that particular district.
  - (3) No use interpretation shall authorize any use in a particular district unless such use is substantially similar to other uses specifically listed as permitted or conditional in such district and is more similar to such uses than to other uses listed as permitted or conditional in another zoning district.
  - (4) If the proposed use is most similar to a use allowed only as a conditional use in the district in which it is proposed to be located, then any use interpretation authorizing such use shall be subject to the issuance of a conditional use permit pursuant to Article 1379 of this Zoning Ordinance.
  - (5) No use interpretation shall allow the establishment of any use that would be inconsistent with the statement of purpose of the district in question, unless such use meets the standards of Subsections (E)(3) and (4) hereof.
- (F) Effect of Favorable Use Interpretations. Use interpretations shall only authorize a use in a specific district and shall not allow the development, construction, reconstruction, alteration, or moving of any building or structure. Use interpretations shall merely authorize the preparation, filing, and processing of applications for any permits and approvals that may be required by the codes and ordinances of the City, including, but not limited to, a Building Permit, a Certificate of Occupancy, Subdivision Approval, and Site Plan Approval.



- (G) Limitations on Favorable Use Interpretations.
- (1) A use interpretation finding a particular use to be Permitted, or allowed as a conditional use in a particular district, shall be deemed to authorize only the particular use for which it is issued, and such interpretation shall not be deemed to authorize any allegedly similar use for which a separate use interpretation has not been issued.
  - (2) Once a use interpretation is made for a particular use in a particular district, that use shall be permitted as a conditional use for the entire district and shall be available for other property owners in that district through the conditional use process.

In reviewing the list of business uses permitted in the R-1A District, it appears that the petitioner's proposed establishment is most similar to a "Florist Shop" use. However, "Florist Shop" is not defined in Article 1329.02 and only appears twice in the Planning and Zoning Code (see Table 1331.05.01 "Permitted Land Uses" and Table 1365.04.01 "Minimum Off-Street Parking Requirements").

Article 1329.02 "Definition of Terms" provides the following guidance when the definition of a term is needed to render an interpretation determination:

"For the purpose of this ordinance, the following words and phrases shall have the meaning respectively prescribed to them by this section. If not defined herein, or within other sections of this ordinance, terms used in this ordinance shall have the meanings provided in any standard dictionary or American Planning Association publication as determined by the Planning Director."

*A Planners Dictionary* provides the following definitions for a "Florist" and "Specialty Retail Sales Establishment" (Planning Advisory Service Report 521/522, American Planning Association, 2004, pgs. 191 and 339):

Florist (see also retail sales establishment, specialty). Retail business whose principal activity is the selling of plants which are not grown on the site and conducting business within an enclosed building.

Retail Sales Establishment, Specialty. Retail operations that specialize in one type or line of merchandise. Such stores may include but are not limited to apparel stores, jewelry stores, bookstores, shoe stores, stationary stores, antique stores, and similar establishments.

Based on the interpretation latitude provided in Article 1375.05 and Article 1329.02, it is the opinion of the Planning Division that the petitioner's proposed business establishment can be classified as a "Florist Shop" with the approval of the Board as a conditional use permitted in the R-1A District.

#### Minimum Parking Calculation

The minimum parking requirement for a "Florist Shop" use is one (1) space per 400 square feet of gross floor area (GFA) PLUS one (1) space per employee. The minimum parking calculation for the petitioner's 592 square foot business establishment would therefore be four (4) off-street parking spaces...one space for the gross floor area and two spaces for the employees.

As a part of the present conditional use petition, the petitioner seeks to utilize the four existing off-site parking spaces located on the adjoining Parcel 448 of Tax Map 29. Said parking spaces appear to have served as the parking area for the previous neighborhood pharmacy and general store establishments. Parcels 447 and 448 are currently owned by the Emil J. Ferrara, Jr. Estate. It appears that the existing parking spaces on both parcels are sufficient to meet off-

street parking requirements for the petitioner's business establishment and the rental dwelling units.

The petitioner submitted a copy of an email dated October 4, 2012 from Mr. Joe Nagy supporting the petitioner's conditional use request. On November 2, 2012 at approximately 8:10 AM, the Staff received a voice mail message from Erin Burkhart of 116 Kingwood Street supporting the petitioner's conditional use petition. At the time of preparing this report, Staff had not received any communications in opposition.

Bossio recognized the petitioner Chris Myers, 258 Kingwood Street. Myers stated that he concurred with the Staff Report.

Cardoso asked Myers to explain the types of products that would be for sale in the proposed shop. Myers explained that he is a graduate of West Virginia University in Physical Education and he wishes to educate people on the different types of ingredients in their food and encourage organic food which is an economic advantage through the use of hydroponics.

There be no further comments or questions by the Board, Bossio opened the public hearing asking if anyone was present to speak in favor of or in opposition to the request. There being none, Bossio declared the public hearing closed and asked for Staff recommendations.

Fletcher stated that the Board of Zoning Appeals must determine whether the proposed request meets the standard criteria for a conditional use by reaching a positive determination for *each* of the "Findings of Fact" submitted by the petitioner. Addendum B of this report provides Staff recommended revisions to the petitioner's findings of fact (deleted matter struck through; new matter underlined). Staff recommends approval of Case No. CU12-17 as requested with the following conditions:

1. That the Certificate of Occupancy for the petitioner's proposed business establishment classified under this conditional use approval as a "Florist Shop" use shall remain dependent upon the continued access, use, and enjoyment by the petitioner of the four (4) parking spaces that directly access Kingwood Street on Parcel 448 of Tax Map 29.
2. That all regulated signage for the subject establishment must comply with related standards set forth in Article 1369 "Signs".
3. That the conditional use approval granted herein is specific to the petitioner and may not be transferred.

Shamberger moved to accept all the Findings of Facts as revised by Staff; seconded by Cardoso. Motion carried unanimously.

**NOTE:** The following Findings of Fact were included in the motion.

**Finding of Fact #1** – Congestion in the streets is not increased, in that:

Property has four designated off street parking spaces located on the adjoining Parcel 448 of Tax Map 29, which appears to have served the parking needs of the previous neighborhood pharmacy and general store uses. Additionally, it appears that sufficient parking spaces are available to meet the parking requirements of the petitioner's "Florist Shop" use and the rental dwellings located on Parcels 447 and 448 of Tax Map 29.

**Finding of Fact #2** – Safety from fire, panic, and other danger is not jeopardized, in that:

Smoke detectors, carbon monoxide detectors and fire extinguishers will be onsite and operational at all times. Business space has two exit points (front and rear). All related Building and Fire Code provisions will be met prior to the issuance of a Certificate of Occupancy for the petitioner's "Florist Shop" use.

**Finding of Fact #3** – Provision of adequate light and air is not disturbed, in that:

There ~~is~~ appears to be adequate light provided to all rooms, entrances and exits on property. Additionally, the proposed "Florist Shop" use will occupy a former business use space that has existed for over fifty years.

**Finding of Fact #4** – Overcrowding of land does not result, in that:

No additional construction or additions to the property is necessary.

**Finding of Fact #5** – Undue congestion of population is not created, in that:

Property appears to have adequate parking for employees, customers, and residents of the rental dwellings at location.

**Finding of Fact #6** – Granting this request will not create inadequate provision of transportation, water, sewage, schools, parks, or other public requirements, in that:

The proposed "Florist Shop" use does not appear to require additional public utilities, services, or facilities that is not already available to the property and surrounding area.

**Finding of Fact #7** – Value of buildings will be conserved, in that:

It appears that the petitioner's "Florist Shop" use should continue the commercial tradition of the building and contribute to the commercial and trade function identified in the National Register of Historic Places for the Greenmont Historic District.

**Finding of Fact #8** – The most appropriate use of land is encouraged, in that:

Proposed space was a retail location for over seventy years.

Cardoso to approve conditional use petition CU12-17 as requested with Staff recommended conditions; seconded by Shamberger. Motion carried unanimously.

Bossio reminded the petitioner that the Board's decision can be appealed to Circuit Court within thirty days and that any work related to the Board's decision during this period would be at the sole financial risk of the petitioner.

- D. V12-34 / West Virginia Radio Corporation / 1251 Earl L. Core Road:** Request by the West Virginia Radio Corporation for variance relief from Article 1331.06(30) "Telecommunications Facility" as it relates to maximum height at 1251 Earl L. Core Road; Tax Map 31, Parcel 7.1; I-1, Industrial District.

Fletcher read the Staff Report stating that the petitioner seeks to remove an existing "Class I Telecommunications Facility" located on the roof of the Greer Building and construct a new 120-foot self-supporting tower adjacent to two existing ground satellite facilities toward the rear of the parking lot.

According to the petitioner, the purpose of the existing and proposed tower facility is to provide line-of-site broadcasting from the Greer Building to the WVAQ radio transmitter site located above the Morgantown Industrial Park on the west bank of the Monongahela River. The existing tower facility is experiencing interference and unstable signal transmission, particularly high definition signals, as a result of urban forest growth between the two respective sites. The proposed site of the new tower facility is intended to optimize line-of-site requirements while keeping the necessary tower height to a minimum. The Greer Building is home to the Dominion Post, four radio stations, and the statewide METRONEWS Radio Network.

Article 1331.06(30) provides that "Class I Telecommunications Facilities" include television antennas, ham radio antennas, and AM/FM reception. Article 1331.06(30)(b)(i) provides that "Class I Telecommunications Facilities":

1. Permitted in any zoning district; Maximum height of sixty (60) feet above grade;
2. Standard Building Permit required; and,
3. A structural engineer shall certify that the design of such structure is such that in the event of structural failure; and,
4. No part of the structure will encroach upon any adjoining property or public right-of-way.

The adjoining property in which the Deckers Creek Trail is located on is currently owned by Glenmark Holdings, LLC or its subsidiary and leased by the City of Morgantown for the purpose of the public rail-trail facility.

The petitioner will provide a technical presentation illustrating present signal interference conditions, technical requirements, and design elements for the proposed tower facility.

Bossio recognized the petitioner Dale Miller, President of WV Radio Corporation, 1251 Earl L., who stated that the new tower is necessary to obtain signals, due to growth in trees and foliage that are adjacent to the current tower. Chris Moran, Director of Technology for WV Radio Corporation, explained that the Corporation currently services 4 radio stations that operate out of the Greer Building, but the actual high power transmission facilities are located on various hill tops in Marion and Monongalia County. The four radio stations and their program signals are transmitted to the WVAQ tower that is located on River Road. Currently in place is a 35 foot tower on the roof of the Greer building, however the growth of trees and foliage near White Avenue have completely blocked the line of site for transmission from tower to tower to occur, particular being in times of inclement weather. The Radio Stations are licensed by the FCC and the Corporation has a priority to serving the public in their news broadcasts. Mr. Moran provided a technical presentation illustrating present signal interference conditions, technical requirements, and design elements for the proposed tower facility.

Bossio asked if the tower is owned by WV Radio Corporation and if any space is subleased. Mr. Moran stated that there is no space that is subleased and the tower will strictly be for WV Radio Corporation use.

Shamberger inquired on the rigidity of the new tower. Moran explained that the new tower would be designed to sustain 110 mph winds. Moran provided visual aid with an engineered drawing of the proposed new tower to further explain the stability of the structure.

There being no further comments or questions by the Board, Bossio opened the public hearing asking if anyone was present to speak in favor of or in opposition to the request.

Bossio recognized Mary Hill of 1228 Mineral Avenue who stated that she had concerns with the possibility of emissions, radiation, noise, interference with radio, computer and television reception and the prospect of being construed as an eye sore. Hill also inquired about her property value with the addition of this tower. In addition, Hill stated that a tower in Westover on McKinley Avenue had caused for residents to lose radio reception after the installation of that particular tower. Hill asked if approval of the proposed tower would allow for future items to be installed on the tower without additional approvals.

Bossio recognized Miller asking if he would address Hill's questions and concerns with a five minute rebuttal. Miller specified that the existing 35 foot tower will be removed prior to installing the new tower and that interference is possible on certain frequencies, but would occur more on the consumer side. Miller explained that the installation of the proposed tower is a migration to a new technology and the station will be going digital. The entire wattage from the Greer building tower to the WVAQ tower will be less than  $1/7^{\text{th}}$  of a watt and radio interferences will not increase with the migration.

Cardoso asked Miller about emissions and if the tower would produce noise. Miller stated that any emissions would be less than one light bulb and the tower will be silent with no lights at night, which are sometimes required with FAA regulations.

Bossio declared the public hearing closed and asked for Staff recommendations.

Fletcher stated that the Board of Zoning Appeals must determine whether the proposed request meets the standard criteria for a conditional use by reaching a positive determination for *each* of the "Findings of Fact" submitted by the petitioner. Addendum B of this report provides Staff recommended revisions to the petitioner's findings of fact (deleted matter struck through; new matter underlined). Staff recommends approval of Case No. V12-34 as requested with the following conditions:

1. That any and all related requirements provided under Article 1743 "Floodplain Ordinance" shall be met to the satisfaction of the City Engineer.
2. That the owner of the subject telecommunications facility shall name and maintain as co-insured any and all owners, tenants, leaseholders, etc. of real estate located within the facility's designed collapse zone; which is understood for these purposes to be that area within which the structure may fall in the event of structural failure. The certificate of insurance shall be provided yearly to said owners, tenants, leaseholders, etc.
3. That a structural engineer shall certify the telecommunications facility's design and related collapse zone, which must be delineated on a scaled site plan that also illustrates the location of the telecommunications facility and appurtenances, property boundaries, structures, roadways, waterways, and the Deckers Creek Trail within a radius from the telecommunications facility extending outward to a distance equal to the telecommunications facility's height.
4. That the existing "Class I Telecommunications Facility" (relay tower) on the Greer Building must be removed within ninety (90) days following the proposed "Class I Telecommunications Facility" being constructed and placed into service.

Shamberger moved to accept all the Findings of Facts as revised by Staff; seconded by Cardoso. Motion carried unanimously.

**NOTE:** The following Findings of Fact were included in the motion.

**Finding of Fact #1** – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

West Virginia Radio Corporation is a fully licensed commercial broadcast facility housing stations WAJR, WVAQ, WKKW, and WFGM as well as the METRONEWS Radio Network. It is imperative that these federally licensed facilities have the means to send aural programming content to a number of radio transmitter locations in Monongalia and Marion counties in West Virginia. West Virginia Radio Corporation owned and operated stations – as well as radio stations affiliated with West Virginia Radio Corporation – serve the public interest with news, sports, weather and public service information – as well as virtually a single source for information in the event of community, statewide or national emergency. It appears that the proposed location and height of the Class I Telecommunications facility is necessary to preserve continued transmission between fixed locations given the growth of the surrounding urban forest, which cannot be controlled or mitigated by the petitioner.

**Finding of Fact #2** – The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

An increase in tower height appears necessary due to the increased growth of trees along the microwave pathway from 1251 Earl L. Core Road to the WVAQ transmission and distribution tower above the Morgantown Industrial Park Complex on the Monongahela River. The increase to a 120' self-supporting tower appears to ensure long-term viability of the delivery pathway for any future eventuality.

**Finding of Fact #3** – The granting of this variance not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

The newspaper-radio station facility at 1251 Earl L. Core Road has been used in this same capacity since it was built in the mid 1960's. No residential housing is near the facility that already has satellite earth stations and other equipment required in the construction and broadcast of radio content. The communication tower located on top of the Greer Building at 1251 Earl L. Core in Morgantown, West Virginia, will be removed when the new relay tower is constructed and placed into service. The base of the tower will be properly secured with locked fencing to prohibit passersby from being able to get close to or climb the structure. While the tower will be lightly loaded with transmission equipment, the tower has been designed with 28% more structural strength than required for a tower of this size.

**Finding of Fact #4** – The granting of this variance not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

The property at 1251 Earl L. Core Road is a dual use commercial newspaper-radio facility and the tower structure is part of the equipment necessary to connect the radio stations to the various transmitter sites used for Federal Communications Commission licensed broadcasts. It is both expected and necessary that the tower exist to provide a communications path to the various transmission facilities. The equipment located on the tower will be of an ultra-low radio frequency nature and will not transmit potentially dangerous RF signals. The power levels used are a fraction of a single watt and occur in the 11Ghz and 950 Mhz range of the radio spectrum. Variance relief will not contribute to, or mitigate, existing traffic patterns.

Cardoso moved to approve variance petition V12-34 as requested to construct a 120-foot self-supporting "Class I Telecommunications Facility" at the location illustrated on exhibits submitted with the variance petition with Staff recommended conditions; seconded by Shamberger. Motion carried unanimously.

Bossio reminded the petitioner that the Board's decision can be appealed to Circuit Court within thirty days and that any work related to the Board's decision during this period would be at the sole financial risk of the petitioner.

- E. V12-35 / D. Shelton and D. Squier / 300 Lebanon Avenue:** Request by Tom Tretheway of Smola Construction, on behalf of Deb Shelton and Donald Squier, for variance relief from Article 1331.08(A) as it relates to maximum height and below grade story of an accessory structure at 300 Lebanon Avenue; Tax Map 37, Parcels 290 and 291; R-1, Single-Family Residential.

Fletcher read the Staff Report stating the petitioner seeks to construct a detached garage on the sloping portion of the property to the right side of the existing single-family house.

Article 1331.08(A)(9) provides that accessory structures in residential zoning districts may not exceed eighteen (18) feet in height. Article 1331.08(A)(10) provides that no accessory structure in a residential zoning district may be constructed with a cellar or below-grade story.

Because of the sloping nature of the property, the average height of the accessory structure is approximately 21.9 feet. Additionally, the petitioner seeks to utilize the foundation area created as a result of the site's topography to develop a cellar or garden tool storage area below the garage. Variance relief is therefore required to construct the accessory structure as proposed.

It should be noted that, at the request of the petitioner, the Planning Division permitted the construction of only the footers, foundation walls, and backfilling prior to obtaining the subject variance approval. The purpose of the petitioner's request to move forward accordingly was to take advantage of the favorable weather, which Staff believed to be a reasonable accommodation.

Mr. Tretheway was advised in the related building permit that he and his client assumed sole financial risk of work completed under the related building permit prior to the subject variance approval. Additionally, Tretheway was advised that should the Board deny in whole or in part the requisite variance petition, he and his client would be responsible for immediately correcting any related Planning and Zoning Code violations and that a stop work order and possible citations would be issued if work commenced beyond that associated with the accessory structure's footers, foundation walls, and backfilling. Fletcher noted that Mr. Tretheway understood and was very agreeable to these constraints.

Bossio recognized the petitioner's representative Tom Tretheway of Smola Construction, who stated that he concurred with the staff report.

Bossio opened the public hearing asking if anyone was present to speak in favor of or in opposition to the request. There being none, Bossio declared the public hearing closed and asked for Staff recommendations.

Fletcher stated that the Board of Zoning Appeals must determine whether the proposed request meets the standard criteria for a variance by reaching a positive determination for *each* of the “Findings of Fact” submitted by the petitioner. Addendum B of this report provides Staff recommended revisions to the petitioner’s findings of fact (deleted matter struck through; new matter underlined). Staff recommends approval of Case No. V12-35 requested with the following conditions:

1. That no part of the subject accessory structure may be designed or used for sleeping purposes and no cooking fixtures may be placed or permitted therein.
2. That the exposed foundation walls must be finished in decorative masonry or cultured masonry materials as illustrated on the elevation drawings submitted with the petitioner’s building permit application.
3. That the subject property owner combine Parcels 290 and 291 of Tax Map 37 by either:
  - a. Combining same by recorded plat with minor subdivision approval from the Planning Commission; or,
  - b. Combining same by recorded deed as provided in Article 1363.02(B)(3).

Cardoso moved to accept all the Findings of Facts as revised by Staff; seconded by Shamberger. Motion carried unanimously.

**NOTE:** The following Findings of Fact were included in the motion.

**Finding of Fact #1** – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

The topography slope from front to rear appears to make compliance with the maximum building height requirement for accessory structures unachievable. The proposed foundation wall design selection over a pier design appears to best reflect the development patterns within the immediate area, which creates an opportunity to incorporate additional storage space without detracting from the property or surrounding area.

**Finding of Fact #2** – The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

It appears that the majority of garages within the neighborhood are attached and located below the house in the basement or lowest levels. The geometry and topography of the subject petitioner’s property appear to limit design alternatives to the proposed detached garage design.

**Finding of Fact #3** – The granting of this variance not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

The proposed design solutions appears to provide for adequate slope of the patio to a 2:1 slope, which avoids the construction of retaining walls and steep grades. It also avoids “dead space” under the structure by incorporating what appear to be high quality building materials that match the existing house.



**Finding of Fact #4** – The granting of this variance will not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

The nature of the variance cannot contribute to nor mitigate existing traffic congestion patterns; the proposed design solution appears to best reflect the development patterns within the neighborhood; and, the foundation wall design should foster a more positive influence to market values over a pier design, which should not be diminished by additional cellar storage space.

Shamberger moved to approve variance petition V12-34 as requested to exceed the maximum height standard of eighteen (18) feet for the accessory structure and to develop a cellar or below-grade story for storage purposes as illustrated on exhibits submitted with the variance petition with Staff recommended conditions; seconded by Cardoso. Motion carried unanimously.

Bossio reminded Tretheway that the Board's decision can be appealed to Circuit Court within thirty days and that any work related to the Board's decision during this period would be at the sole financial risk of the petitioner.

**V. OTHER BUSINESS:**

**A.** Public Comments (matters not on the agenda): None.

**B.** Staff Comments: None.

**VI. ADJOURNMENT: 8:40 PM**

MINUTES APPROVED:

December 19, 2012

BOARD SECRETARY:

  
Christopher M. Fletcher, AICP